

## CONSTITUTIONAL PROHIBITION OF LOCAL AND SPECIAL LEGISLATION IN PENN- SYLVANIA.

(*Third Paper.*)

In connection with the principle just discussed (viz, that any classification of cities must provide for a free movement from one class to another as the municipalities increase in population) should be mentioned another boundary within which the courts have confined the legislature. They have decided that while the legislature is the primary judge of the propriety and advisability of a classification which they are about to make, yet such classification must in fact be reasonable and the court is the final judge of its reasonableness.

By this is meant that there must be such a distinction between the classes that legislation suitable for one would be burdensome and oppressive for the others. This is the first limitation referred to above as laid down in *Wheeler v. Philadelphia*. This unreasonableness may consist in an unnecessarily extended subdivision into classes of a subject-matter proper for classification, or it may consist in classifying subjects which are improper for classification, *i. e.*, where laws applying to the entire subject-matter would be appropriate and reasonable.

The views of the court with respect to the first kind of unreasonableness are well expressed in *Ayars' Appeal*.<sup>1</sup> In that case an act was under discussion which divided the cities of the state into seven classes upon the basis of their population. It was argued that inasmuch as the court had already decided that the legislature had the power to classify cities upon that basis, it followed that the legislature was the sole judge of the reasonableness of the classification. The court, however, promptly negated this proposition, and declared that it was always the function of the court to

<sup>1</sup> 122 Pa. 266 (1889).

inquire into the matter and if they found the law unreasonable to declare it void. The decision was rested very largely on the ground that classification was made a pretext, under the guise of which local and special laws were passed. Mr. Chief Justice Sterrett saying:

"Some of the cases above-cited have been quoted at considerable length for the purpose of showing that this court never intended to sanction classification as a pretext for special or local legislation. On the contrary, the underlying principle of all the cases is that classification, with the view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others. Laws enacted in pursuance of such classification and for such purposes, are, properly speaking, neither local nor special. They are general laws, because they apply alike to all that are similarly situated as to their peculiar necessities. All legislation is necessarily based on a classification of its subjects, and when such classification is fairly made, laws enacted in conformity thereto cannot be properly characterized as either local or special. A law prescribing the mode of incorporating all railroad companies, is special, in the narrow sense that it is confined in its operations to one kind of corporations only; and, by the same test, a law providing a single system for organization and government of boroughs in the state, would be a local law; but every one conversant with the meaning of those words, when used in that connection, would unhesitatingly pronounce such statutes general laws. But, as was said in *Scowden's Appeal*, *supra*, 'classification which is grounded on no necessity and has for its sole object an evasion of the constitution' is quite a different thing."

The plain reason for the decision in this case, was the fact that seven classes of cities are unnecessary. The court must be the judge of the reasonableness of the classification or there will be nothing to prevent the legislature from dividing the cities into as many classes as there are cities and thus enacting laws for each one separately. The classification

of whatever nature it be must owe its existence to some valid distinction between the classes thus separated from each other. The legislature cannot select a small number of cities or counties from all the rest and legislate for them alone even though the distinction be one of population. Thus, in *Scowden's Appeal*,<sup>2</sup> an act which was to apply only to counties of 60,000 inhabitants, containing a city of the fifth class, was held invalid. There is no reason why counties of that size and containing such cities should be subject to laws which do not apply to the other counties in the state. Mr. Justice Paxson said:

"The act of June 12, 1879, makes no attempt at the classification of cities. It is merely an effort to legislate for certain cities of the fifth class to the exclusion of all other cities of the same class. That is to say, it refers only to cities of the fifth class which are situated in a county having a population of 60,000. The act was doubtless regarded by its framers as a classification of counties, but it is not so. Nor does any good reason occur to my mind why there should be such classification. If there be such reasons, amounting to a necessity therefor, we shall probably hear of them in due season. In the meantime classification which is grounded in no necessity, and has for its sole object an evasion of the constitution will not be encouraged."

Referring to the second kind of unreasonableness in classification, there may be some subjects about which no classification can be permitted for the reason that laws strictly general will be appropriate. Following the classification of cities acts were passed which divided counties into groups, based upon their population, and legislation for each of these groups was upheld. The limitations as to the character of the classification are the same as in the case of cities.<sup>3</sup>

In *Chalfant v. Edwards*,<sup>4</sup> the question of the constitutionality of the classification of school districts was raised. In that case it appeared that the legislature had passed an

<sup>2</sup> 96 Pa. 422 (1880).

<sup>3</sup> See *Lloyd v. Smith*, 176 Pa. 213 (1896).

<sup>4</sup> 173 Pa. 246 (1896).

act regulating the affairs of school districts in cities of the second class. The court held it unconstitutional because the act originally classifying cities had classified them for purposes of legislation concerning corporate powers only and had not contemplated legislation concerning other subjects. Mr. Justice Williams said:

"It is contended that he (the presiding judge of the lower court) was in error in holding the act that provides a new system for cities of the second class to be local and therefore unconstitutional, as its provisions include all the members of the class of cities to which it relates. It is true that the classification of cities was upheld in *Wheeler v. The City of Philadelphia*,<sup>4a</sup> but the object of classification is very clearly stated in the act of 1874, that provides for it. It is to facilitate municipal government. The common school system of this state rests on the general law of 1854, it is largely supported by state appropriations, and is under the general supervision of a state superintendent. School directors are by no means municipal officers. They are not invested with any of the municipal powers nor are they charged with the performance of municipal functions. An attempt to regulate the affairs of school districts by local or special laws is expressly forbidden by the constitution in Article III, Section 52, and until the common schools can be regarded as a part of the municipal machinery necessary for the government of cities, this act which relates to cities of the second class must be treated as local in its character. Many efforts have been made to make the classification of cities for municipal purposes serve as a warrant for local legislation on subjects having no possible relation to municipal government, but this court has uniformly refused to sanction them. . . .

"The act now before us was passed to establish a local system. Its results were intended to be local, and only local. They can by no possibility be anything but local. It is, therefore, squarely within the rule laid down in the appeal of the Scranton School District as well as squarely within the words of the constitutional prohibition. It is beyond the power of the legislature to enact, and absolutely void. The learned judge of the court below was right in his con-

<sup>4a</sup> 77 Pa. 338.

clusion upon this subject, and the assignments of error relating to this question are overruled."

*In re Sugar Notch Borough*,<sup>5</sup> an act relating to boroughs and which also affected such school districts as were co-extensive with boroughs was upheld. The court distinguished *Chalfant v. Edwards*, saying that it was decided on the ground that there had been no classification of school districts—not that such a classification could not be made. Mr. Justice Mitchell said:

"There is no constitutional objection to the classification of school districts any more than of cities. Both are included in the same clause of the constitution prohibitory of local and special legislation, and there is no argument against classification of one that is not equally forcible against the other. But classification may become as necessary for school districts as for cities. The needs and the capabilities of school districts may differ as substantially, if not as widely, as those of cities. They already differ in the number and authority of the school officers, the extent and mode of assessing and collecting school taxes, etc. It would be a most unfortunate clog on the improvement of our school system in Philadelphia, Pittsburg, Allegheny, and other cities could not have their high schools, their manual training or industrial schools, or even their kindergardens, without the necessity of imposing the expense of a similar establishment on every borough and sparsely populated township in the state. There is nothing contrary to these views in *Chalfant v. Edwards*,<sup>5a</sup> so much relied on by appellee. . . .

"On the other question the court below was affirmed on the ground that the act of 1874, classified cities solely with reference to strictly municipal functions, and schools, under the general law of 1854, and its supplements, could not as yet be considered a branch of the municipal government. Much of what was said by our late Brother Williams on this subject was by way of historical review of our school system, rather than of discussion and of constitutional powers. Whether some of the expressions did not go beyond what the case called for, and farther than can be ulti-

<sup>5</sup> 192 Pa. 349 (1899).

<sup>5a</sup> 173 Pa. 246.

mately sustained we need not now consider. The utmost that the case can even be claimed to be authority for, is not that the legislature may not classify school districts with reference to cities, but that it has not yet done so."

In *Commonwealth v. Gilligan*<sup>6</sup> substantially the same question was presented as in *Chalfant v. Edwards*. The act of 1874 was attacked on the ground that it regulated the affairs of school districts in cities of the third class. The court, however, upheld it, saying there was an implied if not an express classification of school districts in the act. Mr. Justice Mitchell said:

"The classification of school districts intended by the act of 1874 is upon lines of distinction as genuine and as fundamental as its classification of cities themselves. Both cities and school districts exercise functions which are governmental in character, and they necessarily run closely together. The legislature may recognize this fact, and provide for the regulation of the two powers concurrently in the same territory as far as they relate to the same or similar matters, so that the same governmental functions, as for instance the supreme power of arbitrarily taking the citizen's property by taxation, shall be exercised harmoniously over the inhabitants of the same district."

The apparent change of view on this question, brought about after the death of Mr. Justice Williams, seems to show a drift of the court toward a more liberal interpretation of laws which are close to the border line of the constitution.

Classification of other things and for other purposes has on the same general principles been very generally allowed. A proper classification of persons is upheld as not in conflict with the clause forbidding special legislation, just as classification of cities is deemed not to be in contravention of the clause prohibiting local legislation.

In *Kennedy v. Insurance Company*,<sup>7</sup> a classification of insurance companies was upheld. The following extract from the opinion of Mr. Chief Justice Sterrett explains the ground of the decision:

<sup>6</sup> 195 Pa. 504 (1900).

<sup>7</sup> 165 Pa. 179 (1895).

"The act is not obnoxious to the objection that it is special legislation and therefore unconstitutional. Foreign insurance companies, licensed to transact business in this state, have always been considered and are in fact essentially a distinct class of corporations, justifying and requiring legislation appropriate to the class itself. If such companies, owing their existence to some authority outside and not having their principal offices within the state, are permitted to transact business here, it must necessarily be upon such terms and conditions as will enable the insurance department of the commonwealth to supervise their business operations, etc., and place them within easy and convenient reach of process at the suit of the commonwealth or any of its citizens."

In *Commonwealth v. Jones*,<sup>8</sup> the classification of coal mines for purposes of enacting police regulations for each class separately was upheld. In *Commonwealth v. Wilson*,<sup>9</sup> an act prescribing the terms upon which persons should be licensed to practice medicine and though operating differently upon different classes of physicians, etc., was deemed valid. In *Commonwealth v. Zacharias*,<sup>10</sup> an act which operated unequally upon different classes of applicants for a license to engage in the drug business, was declared unconstitutional, in view of the fact that all applicants whom the act was to affect were equally unskilled. Such an act was very properly held to be not only special but unjust in its operation. This case was approved in *Clark's Estate*,<sup>11</sup> where a law operating unequally on corporations and individuals was held special and void.

In *Commonwealth v. Hanley*,<sup>12</sup> an act was upheld, which regulated the business of undertaking in cities of the first, second, and third classes. It was deemed to be a mere police regulation and to operate only incidentally upon the persons affected.

In *Seabolt v. Commissioners*,<sup>13</sup> it was decided that bridges

<sup>8</sup> 4 Superior, 362 (1897).

<sup>9</sup> 6 Dist. 628 (1897).

<sup>10</sup> 181 Pa. 126 (1897).

<sup>11</sup> 10 Superior, 423 (1898).

<sup>12</sup> 15 Superior, 271 (1900).

<sup>13</sup> 187 Pa. 318 (1898).

were a proper subject of classification and legislation for each class would be valid. In *Commonwealth v. Blackley*,<sup>14</sup> the classification of townships with respect to their density of population was sanctioned. The court said if townships of different densities had different needs there was no reason why such a distinction should not be drawn. The present tendency of the Supreme Court seems to be to uphold classification of any subject at all for purposes of legislation, provided any reasonable ground upon which to base a distinction between the classes can be discerned.

## II. UPON WHAT SUBJECTS LAWS RELATING TO A SINGLE CLASS MAY BE ENACTED.

Although the classification provided by the act may be perfectly reasonable and proper, it does not follow that all laws relating to a single class will be constitutional. The subject-matter of the law must be one that has a distinct relation to the peculiarities of the class to which it applies. Thus, where cities have been classified upon the basis of their population, a law confined in its application to one of those classes must relate to a subject, upon which legislation for cities of all sizes would not only be inappropriate but would be burdensome and oppressive to cities of the other classes. Hence, after discussing the principles relating to classification it becomes necessary to consider how to determine upon what character of subjects laws relating to a single class can be enacted. The most common instances where such questions have been raised are in cases where laws have been passed relating to a single class of cities—the principles as there laid down will also serve to illustrate the rules by which such questions are in general to be decided.

In the act of 1874, the reason for the classification of cities is stated to be:

“For the exercise of certain corporate powers, and having respect to the number, character, powers, and duties of certain officers thereof.”

<sup>14</sup> 198 Pa. 372 (1901).



Under this act it has been decided that a law relating to a single class of cities, to be valid, must:

1. Relate to the exercise of corporate powers.
2. Affect all the cities of the given class in the same manner.
3. Affect the inhabitants of the cities because of their residence therein and because of the circumstances and needs that are peculiar to the class to which the city in question belongs.<sup>15</sup>

Thus, in *Ruan Street*,<sup>16</sup> a law relating to the opening and widening of streets in cities of the first class was held unconstitutional because the "opening of streets" was thought not to be a subject "relating to the corporate powers." Mr. Justice Williams said in that case:

"But answering affirmatively, I will adopt the words of the act of 1874, and say that classification authorizes such legislation as relates to the exercise of the 'corporate powers' possessed by cities of the particular class to which the legislation relates and to the 'number, character, powers and duties' of the officers employed in the management of municipal affairs. These are the purposes contemplated by the legislature, they are the only purposes for which classification seems desirable; they are the only purposes for which it has been upheld by this court. . . .

"Among the many subjects of legislation which classification presents, we may call attention to such as the establishment, maintenance and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provision of an adequate water supply; the paving, grading, curbing, and lighting of the public streets, the regulation of markets and market houses, of docks and wharves, the erection and care of public buildings, and other municipal improvements. These are mentioned, not because they include all the subjects for the exercise of municipal powers, but as a suggestion of some of the more obvious ones, and as an illustration of the character of the subjects upon which legislation for the classi-

<sup>15</sup> *Wyoming Street*, 137 Pa. 494 (1891).

<sup>16</sup> 132 Pa. 257 (1890).

fied cities may be necessary. These classes are thus seen to embrace not mere geographical subdivisions of the territory of the state, but organized municipalities, which are divided with reference to their own peculiar characteristics and needs; and the legislation to which they are entitled by virtue of such division is simply that which relates to the peculiarities and need which induce the division. In this way each class may be provided with legislation appropriate to it, without imposing the same provisions on other classes to which they would be unsuitable and burdensome."

In *Weinman v. Railroad Company*,<sup>17</sup> an act relating to the incorporation of street car companies in cities of the second and third classes, was held invalid because it applied only to those corporations which happened to be situated in those cities. The subject-matter had no relation to corporate powers and general laws only should be sanctioned concerning it. This case was distinguished by the court in *Reeves v. Traction Company*,<sup>18</sup> where an act, repealing the restrictions of street car companies to the use of horse power in cities of the first class, was upheld. In *Betz v. Philadelphia*<sup>19</sup> a law changing the method of collecting debts and enforcing judgment in cities of the first class was declared void. Among other subjects which have been declared by the courts to be improper for class legislation are the creation and extension of liens,<sup>20</sup> and a regulation forbidding the location of cemeteries in proximity to cities of the first class.<sup>21</sup>

The language in the act of 1889 redividing the cities of Pennsylvania into classes differs slightly from that of the act of 1874. The purpose evidently was to increase the subjects concerning which legislation might be enacted for each class separably. The act provides:

"That for the purposes of legislation, regulating their municipal affairs, the exercise of certain corporate powers and having respect to the number, character, powers and

<sup>17</sup> 118 Pa. 192 (1888).

<sup>18</sup> 152 Pa. 153 (1893).

<sup>19</sup> 19 Phila. 452 (1887).

<sup>20</sup> *Scranton v. Whyte*, 148 Pa. 479 (1892).

<sup>21</sup> *Phila. v. Cemetery Co.*, 162 Pa. 105 (1894).

duties of certain officers thereof, the cities now in existence and those to be hereafter created in this commonwealth, shall be divided into three classes," etc.<sup>22</sup>

Even under this act legislation cannot be supported, unless it relates to the exercise of corporate powers,<sup>23</sup> and it must conform in all other respects to the principles already referred to. The theory at the bottom of all classification is that the terms of an act concerning a particular subject cannot without being "burdensome and oppressive" apply to more than one class. Hence if we have a law relating to a subject to which the size of the community has no relation it would be obviously improper to confine its application to a single class of cities. This is very well illustrated in the very recent case of *Commonwealth v. Hospital*,<sup>24</sup> where an act had been passed which had relation to the location of hospitals and pest houses within the built-up portions of cities. It was pointed out that while legislation concerning some evils could not be confined to a community of a particular size, yet the law before the court was valid because there was a reason why the location of hospitals in crowded communities should be regulated in a manner different from that in which the same institutions are regulated when located in more sparsely settled districts, in which case less stringent laws would be sufficient.

Mr. Justice Shafer in delivering the opinion of the lower court, which was affirmed on appeal, said:

"If the legislature for the protection of health in cities, should undertake to prohibit the sale of cigarettes to minors, or oleomargarine to anybody in all the cities of the commonwealth, it could not be claimed that the act was valid. There must be the additional element, that the danger to be guarded against has relation to the local conditions. Cigarettes and oleomargarine are equally deadly in the forest and in the city; but not so a hospital or pest house. . . .

"There is obviously much greater danger to the general public health from such institutions in a populous city than

<sup>22</sup> P. L. (1889), 133.

<sup>23</sup> *Safe Deposit Co. v. Fricke*, 152 Pa. 231 (1893); *Van Loon v. Engle*, 171 Pa. 157 (1895).

<sup>24</sup> 198 Pa. 270 (1901).

in the country, or in a village, and the danger will be in proportion to the number and density of the population, permanent and transient."

In the very recent case of *Commonwealth v. Moir*,<sup>25</sup> the Supreme Court upheld the so-called "Pittsburg Ripper Bill." This act abolished the existing city governments in cities of the second class and substituted therefor another system, similar in most of its features, but differing in the name of the principal executive officer of the city and in a few other particulars. The act also provided that the contemplated change should go into effect at once and gave to the governor the power to fill the office of recorder, and his appointee was to hold office for more than a year—although an election intervened, when the people might fill the office with a man of their own choice.

The majority of the court decided *inter alia*:

1. The law, relating to the corporate government of cities of the second class, was, on its face, general and the court could not inquire into the motives of the legislature.

2. The provision vesting the appointive power in the governor was merely a temporary expedient for putting the law into effect and could not render it unconstitutional.

The law was passed for an obviously improper purpose, viz, to throw into the hands of the political faction, then in power at Harrisburg, the patronage of the city of Pittsburg. This vicious purpose and the inherently bad character of the law was fully recognized by the court. Mr. Justice Mitchell, who delivered the majority opinion, saying:

"The fact that the action of the state towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens, is not one which can be made the basis of action by the judiciary.

"The public interest of the questions involved, though not always their difficulty, has led us to discuss thus in detail the specific objections to the act that the learning and ingenuity of eminent counsel have been able to suggest.

<sup>25</sup> 199 Pa. 534 (1901).

There remains one which is based upon broader and more far reaching considerations than the others, though like most of them it is directed against the schedule. Indeed, the objections to this act may be summed up in the classic phrase *in cauda venenum est*. It is urged that it violates the spirit of the constitution in those provisions and that general intent which preserves to the people the right of local self-government.

"The objection is serious, and there can be no denial that some of the provisions of the schedule infringe upon what the citizens generally are accustomed to regard as their political rights. But our view must be confined closely and exclusively to the constitution."

Mr. Justice Dean vigorously dissented and to many members of the profession his opinion commends itself as being sounder than that of the majority. Justices McCollum and Mestrezat concurred in the dissent.

Omitting the minor questions, the main point upon which the court were divided in opinion was that relating to the local legislation phase of the law. The following questions are pertinent:

1. Was there an imperious necessity for a city government as provided for cities of the second class, which necessity did not exist for cities of the first or third classes?
2. Was the law passed in good faith to answer a need felt by reason of some peculiarity of cities of the second class, or was its apparent general character a mere subterfuge to cover up a law really local in its effects and purposes?

It was said by the majority that they could not inquire into these matters. Mr. Justice Mitchell's language is:

"Secondly, it is objected that the act attempts a classification in the method of filling municipal offices and of exercising municipal powers resting on no proper discrimination or foundation, in that it provides for methods of government and administration of cities of the second class different from those required in cities of the first and third class, in particulars where there is no real difference. It is sufficient to say of this that it is a legislative, not a judicial question. The very object of classification is to provide different systems of government for cities differently situ-

ated in regard to their municipal needs. It was recognized that cities varying greatly in population will probably vary so greatly in the amount, importance and complexity of their municipal business, as to require different officers and different systems of administration. Classification, therefore, is based on difference of municipal affairs, and so long as it relates to and deals with such affairs, the questions of where the lines shall be drawn, and what differences of system shall be prescribed for differences of situation, are wholly legislative. What is a distinction without a difference is largely matter of opinion."

In view of the cases already discussed it seems that the court took a new stand by disclaiming any power to inquire whether the law was in fact general or was only a cloak for a local enactment. Mr. Justice Dean remarks:

"All our recent decisions are to the effect that if local results either are or may be produced by a piece of legislation, it offends against the article prohibiting local and special legislation.

"It is too late, after these decisions, to disclaim our judicial power to inquire, whether the act before us is an adroit attempt to evade the constitutional prohibition against local and special legislation. From its very terms it touches no subject which is not common to every other city in the commonwealth, and if there be a necessity for such legislation in these three cities, then there is the same necessity in all the others. This fact of itself stamps it as local and special legislation, for as is said in *Ayars' Appeal, supra*, there must be a necessity for the legislation 'springing from manifest peculiarities, clearly distinguishing those of one class from each of the others.' No peculiarities in cities of the second class demanding such a law are even pretended. Every member of this court concedes that this legislation is vicious. Why? They do not answer; but, to my mind, it is apparent that its vice consists in its flagrant violation of the fundamental law. We know its purpose was to oust one set of municipal officers in three certain cities, put in place, either directly or indirectly, by the people, and give their offices to others, through the chief executive of the state. This is the inevitable result from the bill itself. Can

we assume that our lawmakers do not intend the obvious results of their acts?"

As was pointed out in the earlier part of this paper the purpose of the convention was to restrain the legislature from enacting vicious laws, in defiance of the wishes of the people of the locality affected. Particularly was it its purpose to prevent legislation which aimed to foster private interests. This law is in direct defiance of both of those aims. It wrests the local government, at least temporarily, from the hands of the local community and it does so for the purpose of augmenting the political power of one faction and of wreaking vengeance upon another. Under these facts it seems that the court might with propriety have inquired into the real purpose of the law as disclosed both by its main body and by its schedule and have declared it void because of the very evident purpose to legislate for certain local communities to the exclusion of the remainder of the state. As Mr. Justice Dean says:

"What the next step in this direction will be we can only conjecture; factional politics and partisan politics are not troubled by scruples; under the principle of this decision, there is nothing to hinder a hostile partisan majority in the legislature from ousting the party in power in Philadelphia, a city of the first class, and placing its government in possession of the minority. The time is not very remote in the past, in English politics, when the victorious political party, as soon as it was seated in power, promptly proceeded to cut off the physical heads of their leading antagonists and confiscate their property; it is not very remote in the future when the victorious political party will promptly proceed to cut off the political heads of its opponents where they hold office by the municipal votes of cities."

It is submitted that to prohibit legislation for such purposes as this was the very reason for calling the constitutional convention. Such laws constituted the evil at which they aimed, and it cannot be doubted that to permit class legislation of this character was farthest from their minds when they enacted the clause forbidding local and special laws. It is to be hoped that the decision is the high water mark in the drift of the court away from the limitations

laid down in the first two decades following the adoption of the constitution, if it be too much to say that it would be a matter for congratulation if a reconsideration and ultimate reversal of the case could be brought about.

The view has been advanced that under the constitution laws in the exercise of the police power may be passed even though they be local or special and their subject-matter be among that forbidden by the clause prohibiting local and special legislation. In *Commonwealth v. Jones*,<sup>28</sup> Mr. Justice Smith, by way of dictum, said it was his own opinion though not of the majority of the court that the proper interpretation of the constitution admitted of local laws passed in the exercise of the police power. The following extract from his opinion explains his ground for this opinion:

"Speaking for myself, I regard it important, in considering the constitutional prohibition of 'any local or special law' upon the subjects enumerated in Article III, Section 7, to take into account the provision of Article XVI, Section 3, that 'the exercise of the police power of the state shall never be abridged.' It is difficult to regard the latter provisions as merely aimed at a legislative abridgment of the police power of the state. The legislature may forbear or neglect to exercise the police power, but no legislative enactment on the subject can abridge the power of a subsequent legislature in the premises, and, as this principle exists independent of the constitutional provision, it was unnecessary as a limitation on the power of the legislature. These prohibitive provisions are to be so construed that both shall stand, if possible. If the prohibition of local or special legislation includes the exercise of the police power in relation to local or special subjects, it is a serious abridgment of that power. The broad and unqualified terms of the section relating to the police power would seem to imply that no abridgment in any manner was intended. Full effect may be given to this section by regarding it as a qualification of the prohibition of local or special legislation, in the nature of a proviso excepting from that prohibition the exercise of the police power of the state on the subjects embraced in it. Such a construction would har-

<sup>28</sup> 4 Superior 362 (1897).



monize the two constitutional prohibitions, and permit an unabridged exercise of the police power on all matters within its scope, whether general, or local and special, leaving to judicial construction, as heretofore, the character and limitations of that power. In this view, the act of 1893, even if local or special in its application, may be sustained as an exercise of the police power of the state, for the protection of life, health and property in the mining operations to which it relates. But it is unnecessary to rule the present case on this construction of these constitutional provisions."

This view is clearly not the view of the Supreme Court as is seen from the decision in *Commonwealth v. Hospital*,<sup>27</sup> which treats a law for the protection of the public health as being within the constitutional prohibition. Indeed the view expressed by Mr. Justice Smith can hardly be defended successfully when we remember that the constitutional clause which he refers to providing that the exercise of the police power must never be abridged, was a prohibition laid upon the legislature, general in its nature and could not operate to neutralize a positive clause of equal authority and of more particular application in the same instrument. Mr. Justice Smith says this is not true because in no case could one legislature abridge the power of a subsequent legislature as to the exercise of the police power and hence the clause would have no meaning if it did not mean to explain or limit the preceding clause. It must be remembered, however, that while it may be that in fact no legislature can by contract divest itself of the police power, yet the principle even if settled is of recent growth and it is very consistent with the views of the law existing at the date of the constitution, that the members of the convention did in fact intend to forbid any contract which shall have the effect of in any way abridging the future exercise of the police power.

### III. EFFECT OF LOCAL LAWS UPON OTHERWISE GENERAL LEGISLATION.

A local law is one which does not apply to the entire state. We have seen that although it does not affect the whole

<sup>27</sup> *Supra*.

state, if the law operates equally upon all of a class of municipalities or counties it is general. But there are still several situations in reference to this question which should be considered. While the act itself may be general in form, other acts may affect it or the local authorities may have such powers under it that the practical effect will be local legislation.

The constitution itself forestalls any possibility of local results being attained by a partial repeal of a general law by an express prohibition of such partial repeal.

General laws have, however, been passed at various times which were to take effect only upon the event of some subsequent action by local authorities either in county or city. As such local action might happen in some cities or counties and not in others the result would seem to be local. It was so held in *Scranton School District's Appeal*.<sup>28</sup> In that case the court declared unconstitutional a proviso to the act of 1875 because by its terms cities of the third class already incorporated at the time of its passage could not become subject to its terms until they had by ordinance accepted them. The opinion of the court was delivered by Mr. Justice Green. He said *inter alia*:

"The proviso to the fifth section of the act of the eighteenth of March, 1875 excludes from the operation of the act all cities of the third class and all cities containing less than 10,000 population previously incorporated, which do not accept, by an ordinance duly passed, the provisions of the act. According to this all cities that do accept, will be subject to the methods of assessment and collection prescribed by the first five sections, and all that do not will not be so subject, and as to them different methods will prevail. Whether the methods prescribed by the act shall be the law, will depend, not upon the terms of the legislation, but upon the will of others who are not law-makers at all; and what may be the law in one city of the third class may not be the law in another city of the same class. In other words, a majority of the members of the city councils in any one city of the third class may impose upon the inhabitants of that

<sup>28</sup> 113 Pa. 176 (1886).

city a method of taxation which may not prevail in any other city of the commonwealth. A law which authorizes this to be done is, in our judgment, clearly obnoxious to the seventh section of the third article of the constitution, which prohibits the General Assembly from passing any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts." . . .

The reason given for the decision was the fact that by the action of local authorities the law in question might be made to apply to some cities of the third class and not to others.

In *Reading v. Savage*<sup>29</sup> the constitutionality of the act of 1874 was attacked. This act provided *inter alia* for the government of cities of the third class and that local laws which had established existing systems of government should not be repealed by the act but might from time to time be repealed by local ordinances. There was a *proviso* admitting existing cities of the third class and cities of less than 10,000 inhabitants to the benefit of the law upon the acceptance of the same by an ordinance. It was urged that this *proviso* was within the ruling of *Scranton School District's Appeal*, and, therefore, void. This view of the case was adopted by Ermentrout, J., and affirmed by the Supreme Court. The following extract from the opinion shows the ground upon which the decision was placed:

"Whatever doubts may have been entertained upon this subject, we feel constrained to say, are settled by the Appeal of Scranton School District,<sup>29a</sup> and we hold that the Fifty-seventh Section comes within the constitutional prohibition of special legislation 'regulating the affairs of counties, cities townships, wards, boroughs or school districts.' We see no difference in principle between this and the section of the act of March 18, 1875,<sup>29b</sup> declared unconstitutional in the above-cited case. Whether the law shall apply is optional in both cases, and the prohibition and restriction of its provisions equally strong in both, without proper acceptance by councils. The criterion as to constitutionality seems clear and plain. The classification of cities under the act of 1874 was held constitutional because of its generality. The rule laid down applied to every case.

<sup>29</sup> 120 Pa. 198 (1888).

There were no exceptions. Wherever the provisions of an act are compulsorily binding upon every city of the particular classification, the legislation is general and constitutional. Wherever the provisions are binding at the option of the local authorities, the legislation is special, local and unconstitutional. It is the compulsorily binding character of the law upon all alike in the classification, that gives it constitutional life."

A re-argument was allowed and the decision was reversed in *Reading v. Savage*.<sup>30</sup> The reasons given for the reversal of the former decision are not entirely satisfactory. The only distinction between the facts of *Scranton School District's Appeal*, and *Reading v. Savage*, was in the wording of the *provisos*. The necessary effect of both was the same in that cities of the same class could have different laws. If we accept the test laid down in the former case that, if the law renders it possible for two cities of the same class to be affected differently by the act it must go down, then it seems hard to escape the conclusion that in reversing *Reading v. Savage*, the court also must be taken to have reversed *Scranton School District's Appeal*. The inconsistency has been attempted to be explained away by pointing out that in *Reading v. Savage*, the law applied to all members of the class which should subsequently become incorporated without acceptance on their part, although acceptance was necessary for existing cities of the third class and for cities of less than 10,000 inhabitants; but in *Scranton School District's Appeal*, the necessary result of the *proviso* was precisely the same. There can be no reasonable doubt that if we apply the test laid down in *Scranton School District's Appeal* to the act in *Reading v. Savage* it too must fall. If, however, we should push this reasoning to its logical conclusion we would be compelled to condemn all general laws which do not at the same time repeal all local laws which are inconsistent therewith, because in such cases a city with a government organized under a local law would of course have a different government from another city of the same size which had accepted the terms of the general act.

<sup>30</sup> 124 Pa. 328 (1889).

The more rational view of laws whose application to a particular community depends upon the action of local authorities is that advanced in *Lehigh Valley Coal Company's Appeal*,<sup>31</sup> where it was said that the true test of the generality of the law is not whether some counties or cities may in fact be affected differently from others, but whether the law offers equal privileges to all. This is a decided departure from the language used in *Scranton School District's Appeal*, where it was said that the possibility of diverse laws for members of the same class rendered the law invalid.

In *Evans v. Phillipi*,<sup>32</sup> it was contended that a general law which did not at the same time repeal all local laws inconsistent with itself would have a local effect and hence would be void. The court, however, decided differently saying that the mere fact that unrepealed local laws intervened would not render an otherwise general act void. The change from local to general must come gradually and as one by one the local laws are repealed the various cities or counties will come under the operation of the general law, thus constantly tending toward uniformity.

#### IV. STATUS OF LOCAL LAWS PASSED WITHOUT PUBLICATION OF NOTICE.

The constitution provides that acts repealing local laws may be passed and local laws on some subjects are not prohibited. There is also a clause which says that: "No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill and in the manner to be provided by law; the evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

The act of 1874 directed in what manner this notice should be published in the locality to be affected.

<sup>31</sup> 164 Pa. 44 (1894).

<sup>32</sup> 117 Pa. 226 (1887).

It has been decided that, particularly where a local act is repealed to make way for another local act, notice of such repealing act must be published in accordance with the constitutional mandate.<sup>83</sup>

A question has been raised whether in case a local law had been regularly passed, it can be attacked on the ground that no proper notice has been given or whether the constitutional injunction was merely aimed at the conscience of the legislature and cannot be inquired into collaterally.

The former view was adopted in *Perkins v. Philadelphia*,<sup>84</sup> Mr. Justice Dean saying: "As to the averment, that the act also violates Section 8, Article 3, because notice of the proposed legislative action was not published in Philadelphia at least thirty days before the introduction of the bill, we can only say, it is not our duty to go behind the law to inquire whether all the precedent formalities have in fact been complied with. The evidence that notice has been published is to be exhibited to the General Assembly; it is not directed to be entered on the journals. The law before us is certified by both houses and approved by the governor. We must presume the requirement as to notice was complied with; to this effect are all authorities of numerous adjudicated cases on the same question."

In *Chalfant v. Edwards*,<sup>85</sup> however, the court declared that if there was no allegation that the proper publication had been made, then the act should be declared void, for that reason. The language of Mr. Justice Williams on this point is: "It now appears that without notice the parties interested procured the passage of this local law in plain violation of the constitution. If it appeared that this question had been considered by the legislature and that body had decided that sufficient notice had been given, or if the committee to which the bill was referred had reported that the constitutional requirement as to notice had been complied with, we might feel ourselves concluded by such action. But there is not the faintest suggestion to be found anywhere that the subject of notice was ever before the mind of

<sup>83</sup> *Chalfant v. Edwards*, 173 Pa. 246 (1896).

<sup>84</sup> 156 Pa. 554 (1893).

<sup>85</sup> *Supra*.

the legislature or attracted the attention of the promoters of the bill. If we should hold that, as a general rule in the absence of any recital or proof upon the subject, notice should be presumed, yet the presumption cannot prevail when it is a conceded fact in the case that no notice was given. The only question then presented is over the validity of an act passed in the face of a clear and positive constitutional prohibition. The learned judge of the court below was of opinion that as the form and manner of publishing notice was prescribed by the act of 1874, the legislature of 1895 having equal power in the premises was not bound by the directions of its predecessor but might disregard them at its pleasure. The power of the legislature to repeal the act of 1874 cannot be doubted, but it had not been exercised. When this act was introduced into the legislature and when it came up on its final passage, the act of 1874 was in full force, and the citizens of Pittsburg had a right to rely upon the observance of its provisions. The point made, however, does not relate to a compliance with the forms of the act of 1874, but with the substance of the constitutional provision that makes notice in the locality, and by publication, an indispensable prerequisite to the passage of a local law. The legislature of 1895, though not bound by the directions of its predecessor was bound by the fundamental law, and its power to pass the repealing act depended on compliance with its mandate."

In this case it was conceded that in fact no notice had been given. What the decision would have been in the absence of such a concession may perhaps be a matter of conjecture. It would seem that the view here taken is the more rational one. The framers of the constitution cannot have meant the clause requiring notice to be of so little force that the legislature may disregard it at pleasure. They must rather have intended that even in the absence of an act prescribing the manner of notice, the General Assembly would be compelled to give the people of the community to be affected an opportunity to be heard, by notifying them that such law was about to be introduced.

*Thomas Raeburn White.*

[THE END.]